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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. BRIAN CHARLES DUBRIN, Defendant and Appellant.	E045914 (Super.Ct.No. FCH07697) OPINION

APPEAL from the Superior Court of San Bernardino County. Mary E. Fuller, Judge. Affirmed.

David M. Morse, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Gary W. Schons, Assistant Attorney General, Ronald A. Jakob and Raymond M. DiGuiseppe, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant, Brian Charles Dubrin, committed separate offenses on different dates, while an inmate in a penal institution. He was subsequently charged with two assaults

(Pen. Code,[1] §§ 4501 [assault by a prisoner, count 1], 245, subd. (a)(1) [assault by means likely to produce great bodily injury, count 3]), one possession of a weapon while an inmate (§ 4502, subd. (a), count 2), and one resisting arrest (§ 69, count 4), in addition to prior conviction allegations under the Three Strikes law (§ 667, subds. (b)-(i)), and two prison priors. (§ 667.5, subd. (b).) The counts were consolidated for trial, and he was convicted on counts 2 through 4, but acquitted on count 1. He was sentenced to an indeterminate term of 25 years to life for count 2, with two concurrent terms of 25 years to life for counts 3 and 4, and a determinate term of one year for the prison prior.

Defendant appeals from the conviction, challenging the denial of his motion for separate trials, and the trial court's refusal to strike one of his prior Strikes. We affirm.

BACKGROUND

The charges against defendant arose from three separate incidents. For this reason, we will describe the cumulative procedural history after discussing the separate incidents that led to the charges. Because defendant was acquitted of count 1, we will not recite the facts relating to that incident, which led to the charge in count 1.

November 17, 2006 Incident (Count 2)

On November 17, 2006, defendant was housed at West Valley Detention Center. On that date, a sheriff's deputy conducted a random cell search of defendant's cell. The deputy found a ratchet portion piece of a leg shackle inside the toilet bowl in defendant's

[1] All further statutory references are to the Penal Code, unless otherwise indicated.

cell. The leg shackle had been straightened and bent out to a point. It was the deputy's opinion that the item was a modified weapon, usable as a shank to pierce or stab, jab or slice someone's neck.

Defendant admitted that because his leg shackles were too tight and the deputies would not loosen them, he broke the shackles off his legs using the lip of the bunk and the lip of the sink. To avoid being charged for the damaged property or disciplined, he needed to get rid of the shackles. To this end, he bent them back and forth till they broke in pieces and then flushed the pieces down the toilet. Thirty minutes after he flushed the last piece down the toilet, a deputy searched his cell and found the one piece still in the toilet.

November 29, 2006 Incident (Counts 3 & 4)

On November 29, 2006, defendant got into a fight with an African-American inmate in a holding cell at the Chino courthouse. A sheriff's deputy, who worked as a custody officer for the Chino courts, heard shuffling sounds coming from a cell and looked in the window. He saw defendant (who is a member of a prison white supremacist gang) fighting with an African-American inmate in the back of the cell. Both inmates had waist and ankle chains on, with their right hands chained to the waist so that their left hands were free. The deputies removed the other inmates who were not involved in the fight from the cell.

The deputy yelled at the two fighting inmates to stop; the inmate defendant was fighting stopped and turned to face the wall in compliance with the directive, but defendant continued to strike him with a closed fist. The deputy used his taser to

immobilize defendant, but defendant continued to resist. The deputy had to use the taser to "drive stun" defendant, and this finally subdued defendant. Defendant was then handcuffed and removed from the cell. As he was being handcuffed, defendant threatened to "get" the deputy several times, and informed the deputy he (the defendant) would have retribution. When placed in another cell, defendant complained of chest pains and was transferred to the hospital. Prior to leaving for the hospital, defendant winked and smiled at the deputy.

Defendant testified he did not hear the deputy tell them to stop fighting, although he saw an officer standing outside the cell. He kept fighting, but put his head down because he thought the deputy was going to mace them for fighting. He heard a loud pop and someone told him to stop resisting; then he was tasered on his left arm and back, between his armpit and waist. The deputy told defendant not to fight in the courthouse and to stop when told, tasing defendant again, and beating defendant on the side of the face, front of the face, and back of the head. The deputy also tasered him on the back, which felt like it went straight through to his heart.

After the tasing stopped, defendant was dragged into the hallway where he was cuffed and escorted to another holding cell. He denied threatening the deputy; he also denied telling the deputy he would have his retribution, claiming he did not know the meaning of the word. He did admit telling the deputy there would be repercussions.

Procedural History

On April 3, 2008, an amended information was filed against defendant. He was charged with committing an assault by a state prisoner (§ 4501, count 1), custodial

possession of a weapon (§ 4502, subd. (a), count 2), assault by means likely to produce great bodily injury (§ 245, subd. (a)(1), count 3), and resisting an executive officer. (§ 69, count 4.) The charges relating to the separate incidents had originally been charged in separate accusatory pleadings, but were consolidated on motion by the People. On July 27, 2007, defendant made a motion to sever the charges, which was denied.

Defendant was tried by a jury. On May 1, 2008, the jury found defendant guilty on counts 2, 3, and 4, acquitting defendant on count 1. In a bifurcated proceeding, the trial court found the two Strike allegations to be true, but struck one of the two prison prior allegations on motion by the People. On May 30, 2008, the court denied defendant's motion to dismiss one of his prior Strike allegations. The court sentenced defendant to an indeterminate term of 25 years to life on counts 2, 3 and 4, but ordered the terms for counts 3 and 4 to run concurrent to count 2. An additional one year was imposed for the remaining prison prior enhancement. The aggregate sentence imposed was for 26 years to life. Defendant timely appealed.

DISCUSSION

1. *The Trial Court Properly Denied the Motion for Separate Trials.*

Defendant was originally charged in three separate accusatory pleadings, case Nos. FCH 7697, FCH 700098, and FWV 700792. The first case arose from an assault on a prisoner while defendant was incarcerated in state prison. The second two cases arose from incidents that took place in local custody pending charges in the first case. Defendant argues that the trial court erroneously denied his motion for separate trials of the 2005 and 2006 incidents. We disagree.

Section 954 provides that an accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated.

Pursuant to section 954 an accusatory pleading may charge two or more different offenses so long as at least one of two conditions is met: The offenses are (1) "'connected together in their commission,'" or (2) "'of the same class.'" (*People v. Soper* (2009) 45 Cal.4th 759, 771.) A trial court "may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately." (§ 954.) The law prefers consolidation of charges. (*People v. Manriquez* (2005) 37 Cal.4th 547, 574.)

Joint trials have long been prescribed—and broadly allowed—by the Legislature's enactment of section 954. (*People v. Soper*, *supra*, 45 Cal.4th at p. 771.) The purpose underlying this statute is clear: a joint trial "ordinarily avoids the increased expenditure of funds and judicial resources which may result if the charges were to be tried in two or more separate trials." (*Frank v. Superior Court* (1989) 48 Cal.3d 632, 639.) A unitary trial requires a single courtroom, judge, and court attachés. Only one group of jurors need serve, and the expenditure of time for jury voir dire and trial is greatly reduced over that required were the cases separately tried. (*People v. Bean* (1988) 46 Cal.3d 919, 940.)

In addition, the public is served by the reduced delay on disposition of criminal charges both in trial and through the appellate process, promoting judicial efficiency.

(*People v. Bean, supra*, 46 Cal.3d at pp. 939-940; see also, e.g., *People v. Geier* (2007) 41 Cal.4th 555, 578; *People v. Ochoa* (1998) 19 Cal.4th 353, 409; *People v. Mason* (1991) 52 Cal.3d 909, 935.) For these and related reasons, consolidation or joinder of charged offenses is the course of action preferred by the law. (*Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1220.) The burden is on the party seeking severance to clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried. (*People v. Soper, supra*, 45 Cal.4th at p. 773.) The defendant can predicate error in the denial of the motion only upon a clear showing of potential prejudice. (*People v. Manriquez, supra*, 37 Cal.4th at p. 574.)

Section 954 expressly vests the trial court with discretion to determine whether to order separate trials. (*People v. Earle* (2009) 172 Cal.App.4th 372, 387.) We review the denial of a motion for separate trials for an abuse of discretion. (*People v. Smith* (2007) 40 Cal.4th 483, 510.) Refusal to sever charges on a defendant's motion may be an abuse of discretion where: (1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a "weak" case has been joined with a "strong" case, or with another "weak" case, so that the "spillover" effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty. (*Id.* at p. 511.)

In the present case, the trial court denied the motion for separate trials finding that there was a common element of substantial importance respecting the fact that all three incidents occurred in a custodial setting. Additionally, the evidence of defendant's

membership in a prison white supremacy gang, as well as the evidence of prior incidents, was cross-admissible to show motive or intent, where the two assault crimes were racially motivated. Thus, the court found (1) the crimes were of the same class, (2) none of the charges was likely to inflame a jury, and (3) the evidence was cross-admissible. Additionally, none of the charges involved the death penalty.

We agree with the trial court. There were no unusually inflammatory offenses involved. Although defendant argues that the prosecution sought to join a strong case with two weaker cases, a mere imbalance of the evidence will not indicate a risk of prejudicial "spillover effect," militating against joinder and warranting severance. (*People v. Soper, supra,* 45 Cal.4th at p. 781.) To the extent defendant asserts the charges relating to the assaults on separate inmates were weaker than the weapon offense, the fact defendant was acquitted of one of the "weaker" charges demonstrates there was no "spillover effect."

The trial court did not abuse its discretion in denying the motion for separate trials.

2. *The Trial Court Properly Denied Defendant's Motion to Strike His Prior Serious Felony Conviction (Strike) on Constitutional Grounds.*

In addition to the substantive counts, the information alleged defendant had two Strikes: (a) a 2000 conviction for criminal threats (§ 422), and (b) a 1997 conviction for assault with a deadly weapon. (§ 245, subd. (a)(1).) After the verdicts of guilt on the substantive charges were returned, defendant filed a motion inviting the trial court to exercise its discretion to strike both of his Strikes pursuant to the Supreme Court holding in *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

However, in addition to the discretionary bases, defendant argued that his 2000 conviction for criminal threats (§ 422) should be stricken because it was not intended to constitute a strike at the time of the plea. The court denied the motion and found both Strikes allegations to be true. On appeal, defendant argues that the trial court erroneously failed to rule on the motion, and that the motion to strike the criminal threats Strike should have been granted.[2] We disagree.

First, defendant is in error in asserting that the trial court did not address the motion on the merits respecting the question of whether the criminal threats conviction should have been considered a strike. On May 1, 2008, during the court trial on the prior convictions, the defendant argued that his criminal threats conviction (§ 422) was not a Strike because that crime was not added to the statutory definition of a serious or violent felony until the passage of Proposition 21, which became effective on the date of his plea. Further, he argued that at the time of the plea, the prosecutor informed the defendant that the initiative did not make a conviction for violating section 422 a "strikable" offense. For this reason, defendant contended that application of the Strikes law to that conviction "would be constitutionally invalid."

The court pointed out to defendant he had not filed a motion to strike the prior on the grounds it was an illegal plea agreement but it agreed to give defendant the opportunity to raise the issue, and put the matter over in order to have some points and

[2] On appeal, defendant does not raise any challenge to the court's exercise of discretion in declining to strike the Strike per *Romero*.

authorities on the issue. On May 5, 2008, the parties returned to present further argument. The parties orally submitted citations to three cases, and defendant argued only that the criminal threats conviction did not constitute a strike. After argument, the trial court found the Strikes allegations to be true as to both alleged Strikes. Contrary to defendant's contention, the trial court did rule on the merits of the only point preserved at trial by ruling that the prior conviction qualified as a Strike.

On appeal, defendant contends the court erred in declining to strike the Strike allegation because his plea of guilty to the criminal threats charge was not constitutionally valid. We disagree. Under *People v. Sumstine* (1984) 36 Cal.3d 909, a prior conviction obtained in violation of any of a defendant's constitutional rights may not be used to enhance a prison sentence. (*Id.* at pp. 918-919; see also, *People v. Allen* (1999) 21 Cal.4th 424, 430.) However, this rule only applies where the conviction was obtained in violation of the defendant's *Boykin-Tahl* rights,[3] or violation of defendant's right to counsel. (*People v. Allen, supra*, at pp. 426, 435.)

Here, defendant does not claim that his plea of guilty to the criminal threats charge in 2000 was constitutionally defective on *Boykin-Tahl* grounds, or that he was deprived of his right to counsel with regard to the prior conviction. To the contrary, the transcript of the plea proceedings in the 2000 case shows defendant was fully advised of his constitutional rights, and was represented by competent counsel. Thus, the plea was not constitutionally defective.

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[3] Referring to *Boykin v. Alabama* (1969) 395 U.S. 238 [89 S.Ct. 1709, 23 L.Ed.2d 274], and *In re Tahl* (1969) 1 Cal.3d 122.

The only other basis for challenging the prior conviction is that the plea was not knowingly and intelligently made because defendant was erroneously informed his conviction would not constitute a strike. When entering a guilty plea, the defendant must be advised of the direct consequences of the conviction. (*Bunnell v. Superior Court* (1975) 13 Cal.3d 592, 604.) However, possible future use of a current conviction is not a direct consequence of the conviction requiring admonishment. (*People v. Bernal* (1994) 22 Cal.App.4th 1455, 1457.) Instead, the possibility of enhanced punishment in the event of a future conviction is a collateral, rather than a direct, consequence of the conviction. (*People v. Gurule* (2002) 28 Cal.4th 557, 634.)

A collateral consequence is one which does not "inexorably follow" from a conviction of the offense involved in the plea. (*People v. Crosby* (1992) 3 Cal.App.4th 1352, 1355.) A defendant need not be advised of the collateral consequences of a plea. (*People v. Sipe* (1995) 36 Cal.App.4th 468, 479.) Thus, a criminal defendant's actual knowledge of the collateral consequences of his or her plea is not a prerequisite to a knowing and intelligent plea. (*People v. Reed* (1998) 62 Cal.App.4th 593, 598.) Defendant acknowledges this much, but contends that the misinformation or misadvice by the prosecutor that the conviction would not qualify as a Strike is an exception to this rule.

The fact defendant was informed that the prosecutor did not intend for the criminal threats conviction to constitute a strike does not infect the validity of defendant's guilty plea in that case unless the defendant establishes that he or she was prejudiced by the misadvisement, i.e., that the defendant would not have entered the plea of guilty had the

proper advisement been given. (*People v. Zaidi* (2007) 147 Cal.App.4th 1470, 1488, citing *People v. McClellan* (1993) 6 Cal.4th 367, 378.) In the present case, the motion to strike the prior conviction was based on *Romero, supra,* not on the constitutional invalidity of the prior, although counsel included a single paragraph to that effect in his *Romero* motion. The defendant did not testify or even execute a declaration to show that his guilty plea in the Los Angeles case was induced by a promise that it would not be a strike. Indeed, the question of whether the conviction would qualify as a strike or not did not come up until after the defendant had entered his plea in the prior case (Los Angeles case No. KA-046040) and had been sentenced.

Defendant's argument is reminiscent of that made in *People v. Sipe, supra,* a case arising shortly after passage of the Three Strikes law. In that case, and all that have followed it, the court held that a person's pre-March 7, 1994 (the effective date of the Three Strikes law) convictions could be used as Strikes. (*People v. Sipe, supra,* 36 Cal.App.4th at pp.476-479; see also *Gonzales v. Superior Court* (1995) 37 Cal.App.4th 1302, 1306-1308.) The court reasoned that because a prior conviction does not have effect as a "Strike" unless and until the defendant commits a new felony, the future use of the conviction is not a direct consequence requiring advisement. (*Sipe, supra,* at p. 479.)

The same rule applies to persons who pled guilty in 2000 to crimes added to the list of serious or violent felonies that may be used as Strikes on or after the date of the conviction. Because the criminal threats (§ 422) conviction did not have effect as a "Strike" until the defendant committed his current crimes, it is irrelevant whether the

prosecutor in the 2000 case intended the conviction to be used in the future as a Strike, or advised defendant it would not constitute a Strike.

The court did not err in making a true finding that the prior conviction for criminal threats (§ 422) constituted a Strike, and in declining the invitation to strike that conviction. (§ 1385; *People v. Superior Court (Romero)*, *supra*, 13 Cal.4th 497.)

DISPOSITION

The judgment is affirmed.

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s/Gaut
J.

We concur:

s/Ramirez
P. J.

s/Hollenhorst
J.